Supreme Court, U.S.
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No. 98-1784

IN THE

Supreme Court of the United States

TERESITA PACK,

Petitioner,

v.

KMART CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the mental activity of concentrating is a "major life activity" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A).

2. Should the determination of whether plaintiff's mental impairment of major depression is a "disability" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A), be made without regard to her use of mitigating or corrective measures, such as medication?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Steve Nicholas was listed as a party before the Court of Appeals, and the Equal Employment Opportunity Commission appeared as *amicus curiae* on behalf of the plaintiff-appellant in the Court of Appeals.

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Petitioner, Teresita Pack, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Tenth Circuit was withdrawn upon the Court's denial of rehearing and is not reported. *See* 1998 WL 918313. The order on rehearing and the clarified opinion of the Court of Appeals are reported at 166 F.3d 1300 (10th Cir. 1999). These opinions are reprinted in Appendix A. The ruling of the United States District Court for the Eastern District of Oklahoma in *Pack v. Kmart Corp., et al.*, No. 96-CV-643-B was announced from the bench and is not published, but is reprinted in Appendix B.

STATEMENT OF JURISDICTION

The original judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 29, 1998. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc, withdrew its original opinion, and entered a new opinion and judgment on February 4, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, 42 U.S.C. §12102(2) provides:

§12102. Definitions

As used in this Act:

(2) Disability. The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; or

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

The fundamental questions presented are whether the mental activity of concentrating is a "major life activity" under the Americans with Disabilities Act ("ADA") and whether the evaluation of Ms. Pack's disability should be undertaken without regard to the medications she was taking to control her depression and sleep deprivation.

The opinion of the Court of Appeals adequately summarizes the factual record for the purposes of this appeal. Pack became employed with Kmart in 1976. Over the next eighteen years she worked in a variety of positions for Kmart with an excellent work record. In 1987, Pack transferred to a pharmacy technician position.

In late 1993, Pack began seeing her family physician for stress-related physical and emotional problems. She had impaired concentration and was suffering from sleep deprivation. One of the ways in which her impaired concentration manifested itself at work was through prescription errors.

After referral to a psychiatrist, Pack was diagnosed with major depression, moderate to severe, in July, 1994. Pack then began taking medications for her depression and sleep deprivation. Pack's poor concentration was specifically

noted by Kmart on her August, 1994 performance evaluation.

In June, 1994, and again in September, 1994, Pack took medical leaves of absence for treatment. After each medical leave, however, her concentration failed to significantly improve. In addition, Pack had been repeatedly requesting transfer to a variety of vacant positions requiring less concentration as a reasonable accommodation for her disability, but these requests were denied by Kmart.[1] After returning to work from her second medical leave, Pack's work failed to sufficiently improve and her employment was terminated by Kmart on February 2, 1995.

After timely filing a charge of disability discrimination and receiving a Notice of Right to Sue, Pack filed a complaint in the United States District Court for the Eastern District of Oklahoma against Kmart alleging, *inter alia*, disability discrimination under the Americans with Disabilities Act, 42 U.S.C. §12102, *et seq.*

In her action, Pack claimed that her mental impairment of major depression substantially limited her ability to perform the major life activities of concentrating and sleeping. Pack expressly did not claim that her ability to work was substantially limited.

Kmart's motion for summary judgment was denied, and the case proceeded to trial. At the conclusion of the evidence, Kmart moved for judgment as a matter of law under Fed. R. Civ. P. 50. The district court found that neither concentrating nor sleeping were major life activities,

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1/ The question of whether Kmart discriminated against Pack by refusing to transfer her to a vacant position as a reasonable accommodation is not presented, because of the Court of Appeals' holding that Pack cannot demonstrate that she is "disabled" under the Act. 166 F.3d at 1304 n.4.

and that even if they were, Pack's evidence of substantial limitation was legally insufficient to tender the case to the jury. App. B-2. Kmart's Rule 50 motion was granted and Pack appealed.

After reciting the controlling principles governing the ADA, the Court of Appeals analyzed the case in two parts.[2] First, the Court addressed the question of whether concentrating and sleeping were major life activities under the ADA. With virtually no discussion, the Court of Appeals held "that sleeping is a major life activity, but concentration is not." 166 F.3d at 1305; App. A-23. Although recognizing that "[c]oncentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking," the Court of Appeals nevertheless concluded that "concentration is not itself a major life activity." *Id.*

Having found that sleeping was a major life activity, the Court of Appeals next addressed the question of whether Packs' evidence that her sleeping was substantially limited was legally sufficient to send the case to the jury. In reviewing this evidence and finding it legally insufficient, the Court expressly evaluated Pack's sleep deprivation in its medicated state, noting that "Dr. Koduri was able to generally control Pack's sleep problems with medication,..." 166 F.3d at 1306; App. A-25-26. Accordingly, the Court of Appeals found Pack's evidence of sleep limitations to be legally insufficient.

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2 Because the defendant conceded the point, the Court of Appeals assumed for the purposes of the appeal that major depression is a mental impairment within the meaning of the ADA. 166 F.3d at 1304; App. at A-21. Depression has been held to constitute a mental impairment. *See Doe v. Region 134 Mental Health-Mental Retardation Comm.*, 704 F.2d 1402, 1408 (5th Cir. 1983)(Rehabilitation Act).

On the basis of these holdings, the district court's grant of judgment as a matter of law was affirmed. Pack filed a timely petition for rehearing and suggestion for rehearing *en banc*. On February 4, 1999, the Court of Appeals denied the petition for rehearing and the suggestion for *en banc* review, withdrew its earlier opinion, and filed a new opinion clarifying an evidentiary issue raised by petitioner.

Petitioner now asks this Court to review the judgment of the Court of Appeals, because the Tenth Circuit's opinion decides a question of federal law in a way that conflicts with this Court's decision in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998); because the question of whether concentrating is a "major life activity" under the ADA is an important question of federal law that has not been, but should be, decided by this Court; because the decision of the Tenth Circuit is in conflict with the decision of the Eleventh Circuit and the EEOC Interpretive Guidelines on this same question; and because this Court has already granted *certiorari* on the question of whether disabilities should be evaluated without regard to the use of medication.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN *BRAGDON V. ABBOTT* REGARDING THE SCOPE OF "MAJOR LIFE ACTIVITY" UNDER THE AMERICANS WITH DISABILITIES ACT.

Conceding that "[c]oncentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking," the Court of Appeals nevertheless holds as a matter of law that "concentration is not itself a major life activity." 166 F.3d at 1305; App. at A-23. In so holding, the Court of Appeals not only summarily rejects the EEOC's interpretive guidance that concentration is

a major life activity, but also arrives at a conclusion that is wholly inconsistent with the broad view of major life activities embraced by the United States Supreme Court in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998). *See* EEOC Compliance Manual (BNA) No. 59, at E-2 (Mar. 27, 1997).

In *Bragdon v. Abbott, supra*, this Court had occasion to address the scope of the major life activities included within the ADA.[3] In *Bragdon*, a dental patient with asymptomatic HIV disease challenged her dentist's refusal to treat her in his office as unlawful discrimination under the ADA. The patient asserted that asymptomatic HIV disease substantially limited her major life activity of reproduction. The dentist claimed, *inter alia*, that reproduction was not a major life activity, because Congress intended the ADA to cover only those activities that have a public, economic, or daily character. 118 S. Ct. at 2205. This Court soundly rejected that position:

> The argument founders on the statutory language. Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside of the meaning of the word "major." The breadth of the term confounds the attempt to limit its construction in this manner.

118 S. Ct. at 2205 [Emphasis supplied].

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3 The Court of Appeals correctly concluded that "[i]n deciding whether a particular activity is a 'major life activity,' we ask whether that activity is significant within the meaning of the ADA, rather than whether that activity is important to the particular individual." 166 F.3d at 1305; App. A-22-23. *See Bragdon v. Abbott*, 118 S. Ct. at 2204-05; *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642 (2d Cir. 1998).

This Court clearly believed that Congress intended to afford a broad view to the phrase "major life activity."[4] Noting that the regulations eschew the enunciation of a general principle to define "major life activity," this Court pointed to the non-exhaustive regulatory list of illustrative examples to undermine the dentist's argument. This Court then noted that the stated examples of caring for one's self and performing manual tasks belie the suggestion that major life activities must have a public or economic character. *Id.* Because the dentist "advance[d] no credible basis for confining major life activities to those with a public, economic, or daily character," the Court agreed with the conclusion of the Court of Appeals that reproduction is a major life activity under the ADA. *Id.*

The Court of Appeals' decision in the case at bar advances no credible rationale for concluding that concentration is not a major life activity. The Court of Appeals' decision implies that, although an important and necessary function, concentration cannot stand on its own as a major life activity because it is a component of other major life activities, such as learning or working. 166 F.3d at 1305; App. A-23. Like the dentist's argument in *Bragdon*, however, this conclusion runs aground on the rocks of the statutory language. There is nothing in the ADA or its implementing regulations that remotely suggest such a limitation on the scope of major life activities.[5]

4/ The Congressional finding that "some 43,000,000 Americans have one or more physical or mental disabilities" evinces the view of Congress that the sweep of the Act was intended to be broad. 42 U.S.C. §12101(a)(1).

5/ It is so evident that concentrating is a major life activity that other courts have assumed it to be so without much discussion. *See, e.g., Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1133-34 (11th Cir. 1996)(permitting plaintiff's claim to go to the jury on her ADA claim that her depression substantially limited, *inter alia*, her major life activity of concentrating), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997); *Sherback v. Wright Automotive Group*, 987 F.

Indeed, the major life activities identified in the regulations, together with those in the EEOC interpretive guidance that have been approved by the Tenth Circuit, compel an opposite conclusion. For example, the activity of "walking" is specifically mentioned as a major life activity in the regulations. 29 C.F.R. §1630.2(i). The activity of "standing" is identified in the EEOC interpretive guidance and is recognized by the Tenth Circuit in the decision below as a major life activity. 166 F.3d at 1305; App. A-22 & 23. *See also MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443-44 (10th Cir. 1996). In the same manner that concentration is an important and necessary component of learning, standing is an important and necessary component of walking. Yet both walking and standing are independently recognized as major life activities. Likewise, learning may be an integral component of working, and performing manual tasks may be a component of caring for one's self. Nevertheless, each of these activities are individually recognized by the regulation to be major life activities under the ADA. 29 C.F.R. §1630.2(i). The conclusion that an important and necessary brain function is not a "major life activity" solely because it is also a component of other major life activities must fail in the same way that the dentist's effort to limit the phrase failed in *Bragdon*.

The activity of concentrating is one of our most basic cognitive functions. As noted by the Court in *Bragdon*, the "'plain meaning of the word 'major' denotes comparative importance' and 'suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance.' " 118 S. Ct. at 2205, *quoting with*

Supp. 433, 438 (W.D. Pa. 1997)(jury could find plaintiff disabled under ADA if it agreed that post traumatic stress disorder substantially limited, *inter alia*, the major life activity of concentrating).

approval, *Abbott v. Bragdon*, 107 F.3d at 939, 940 (1st Cir. 1997). One can hardly envision a mental activity any more important that the act of concentrating.

Defined as the ability to "employ all one's thought or attention or effort on something," the activity of concentrating is central to a wide variety of everyday tasks, including but not limited to learning, working, driving, shopping, preparing meals, and interacting with others. *Oxford American Dictionary* (Oxford 1980). *See also* Campbell, Robert Jean, M.D., *Psychiatric Dictionary* 70, 144 (Oxford 1989)(equating "concentration" with "attention"). The ability to concentrate "permits us to focus on a given subject despite the presence of other signals and stimuli." Balsam, Alan and Zahn, Albert, *Disability Handbook* §11.08 at 584 (McGraw-Hill 1990). *See also Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1081 n.2 (10th Cir. 1997)(citing *Disability Handbook* as authoritative); "When Kids Can't Concentrate: Attention Deficit Disorder," 62 *Consumer Reports* 56-57 (Feb. 1997)(noting that ADD results in lessened ability to control one's attention, that depression can mimic ADD, and that effects of ADD can be so pervasive as to disrupt daily life); Keeley, Jim, "Practice Makes Perfect: Finding the Brain's Autopilot," 16 *Total Health* 28 (Apr. 1, 1994)(attention is the collection of mental states that allow people to organize themselves in the world).

Concentration is fundamental to our ability to perform many of the tasks of daily living. It is clearly a basic and significant activity that the average person in the general population performs with little or no difficulty.[6] 29 C.F.R.

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[6] Any concern that the ability to concentrate cannot be adequately measured for comparison to the average in the general population is misplaced. The ability to concentrate can be reasonably evaluated with a variety of reliable psychological tests, most notably the Wechsler Adult Intelligence Scale-Revised (WAIS-R). *See* Rapaport, D., Gill, M. & Schafer, R., *Diagnostic Psychological Testing* at 105, Rev. ed. (Int'l

App. §1630.2(i). The rejection of concentration as a major life activity by the Court of Appeals cuts to the very heart of the protections afforded by the ADA for people with mental impairments. Just because we cannot "see" the inability to concentrate in the same way we can "see" the inability to walk does not render concentration any less significant in our daily existence. To deny a major brain function, such as concentration, status as a major life activity under the ADA would ignore the realities of mental illness and "would largely nullify the ADA's protection of the mentally disabled." *Den Hartog v. Wasatch Academy*, 129 F.3d at 1087.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT AND THE EEOC GUIDELINES WITH RESPECT TO THE STATUS OF CONCENTRATION AS A MAJOR LIFE ACTIVITY UNDER THE ADA, AND THE TENTH CIRCUIT'S DECISION ON THIS ISSUE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

In the case at bar, the Court of Appeals for the Tenth Circuit neither cited nor discussed the decision of the Eleventh Circuit in *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997).[7] In *Pritchard*, an electrical engineer suffering from depression was terminated from her employment after being placed on disability leave. She brought suit against her former employer asserting claims, *inter alia*, under the ADA and the Rehabilitation Act. She claimed that her depression

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Univ. Press 1975)(noting that the Digit Span and Arithmetic sub-tests of the WAIS are specific for attention and concentration).

[7] This case was presented to the Court of Appeals in the Brief *Amicus Curiae* of the Equal Employment Opportunity Commission.

substantially limited her major life activities of sleeping, concentrating, and communicating. 92 F.3d at 1132. The district court granted summary judgment to the employer and Pritchard appealed.

On appeal, the Eleventh Circuit analyzed the evidentiary materials and was able to conclude that Pritchard's "impairment does not substantially limit the major life activity of working." 92 F.3d at 1133. Finding, however, that there were genuine issues of material fact as to whether Pritchard suffered from other symptoms and whether those symptoms substantially limited a major life activity, the Court reversed the grant of summary judgment on the ADA and Rehabilitation Act claims. *Id.*

The Eleventh Circuit did not squarely hold concentration to be a major life activity as that precise issue was not directly decided by the district court. The Court's reversal of summary judgment after finding that Pritchard was not substantially limited in her ability to work, however, leaves little doubt that the Court regarded sleeping, concentrating, and communicating to be major life activities under the ADA. 92 F.3d 1133-34. Apparently, the Eleventh Circuit believed this conclusion to be so self-evident that no detailed discussion of the issue was deemed necessary. *See Sherback v. Wright Automotive Group*, 987 F. Supp. 433 (W.D. Pa. 1997) where, in rejecting the employer's motion for summary judgment, the court noted that "a fact finder could well determine plaintiff's impairment [of post traumatic stress disorder] has substantially limited many of his major life activities, including work, interaction with others, marriage, thinking, and concentration, and his claim under the ADA's first category of disability must be permitted to go forward." 987 F. Supp. at 438 [Emphasis supplied].

Moreover, the EEOC has expressly recognized that "mental impairments restrict major life activities such as

learning, thinking, concentrating, interacting with others, [footnote omitted] caring for oneself, speaking, performing manual tasks, or working." *Guidance on Psychiatric Disabilities And the Americans with Disabilities Act*, EEOC Compliance Manual (BNA) No. 59, at E-2 (Mar. 27, 1997). The EEOC issued its interpretive *Guidance on Psychiatric Disabilities And the Americans with Disabilities Act* for the express purposes of "facilitat[ing] the full enforcement of the ADA with respect to individuals alleging employment discrimination based on psychiatric disability; respond[ing] to questions and concerns expressed by individuals with psychiatric disabilities regarding the ADA; and answer[ing] questions posed by employers about how principles of ADA analysis apply in the context of psychiatric disabilities." EEOC Compliance Manual (BNA) No. 59, at E-1 (Mar. 27, 1997). The EEOC apparently believed that additional guidance for psychiatric disabilities was necessary, because "people with psychiatric disabilities and employers...have posed numerous questions to the EEOC about this topic." *Id.*[8]

Notwithstanding the EEOC's clear recognition of concentration as a major life activity, the Court of Appeals flatly rejected the EEOC guidance without discussion or analysis, commenting only that the EEOC's guidance "does not carry the force of law and is not entitled to any special deference." 166 F.3d at 1305 n.5; App. A-22. This Court, however, has long regarded administrative interpretation within the sphere of an agency's expertise to be a proper source for guidance. Indeed, in *Bragdon v. Abbott, supra*, this Court commented:

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8 The EEOC noted that between July, 1992 and September, 1996, 12.7% of the charges filed with the EEOC were based upon emotional or psychiatric impairment. This represents a very significant number of individuals with mental impairments. EEOC Compliance Manual (BNA) No. 59, at E-1 n.3.

> Our holding is confirmed by a consistent course of agency interpretation....Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. [citation omitted]. It is enough to observe that the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." [citation omitted].

118 S. Ct. at 2207.

Historically, the Courts of Appeals, including the Tenth Circuit, have consistently relied upon the EEOC interpretive guidance of the ADA, except where a Court has expressly found the guidance to be in direct conflict with the statutory language of the ADA. *See, e.g., Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 899 & 901-02 (10th Cir. 1997); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1081 (10th Cir. 1997)(relying on EEOC interpretive guidance on psychiatric disabilities); *Siemon v. A.T. & T. Corp.*, 113 F.3d 1175, 1179 (10th Cir. 1997); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1443-44 (10th Cir. 1996); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1173 (10th Cir. 1996). *See also, e.g., Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998); *Matczak v. Frankford Candy & Choc. Co.*, 136 F.3d 933 (3d Cir. 1998); *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir.

1996), *cert. denied*, 117 S. Ct. 1349 (1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2d Cir. 1999)(approving EEOC Guidance on mitigating measures in an ADA Title II case).

This principle was well illustrated in *Sutton*. In addressing the existence of the claimed impairment, the Court in *Sutton* followed the EEOC's Interpretive Guidance, because it was "reasonable and consistent with the statutory mandates themselves." 130 F.3d at 899. Conversely, in determining whether corrective measures should be considered in evaluating the extent of the limitation on a major life activity, the Court of Appeals chose to reject the EEOC Interpretive Guidance, because it "is in direct conflict with the plain language of the ADA." 130 F.3d at 902.[9] The *Sutton* Court's rejection of the Interpretive Guidance clearly articulated an analysis for the rejection. The Court of Appeals' decision in the case at bar, however, fails to explain in any respect why the EEOC Interpretive Guidance identifying concentration as a major life activity is rejected.

Although the EEOC Interpretive Guidance may not possess the same force of law as an agency regulation that has been promulgated through the Administrative Procedures Act, Pack contends that the EEOC's Guidance should be followed as long as it is reasonable and consistent with the

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9 Judge Barrett's opinion in *Sutton* , and a companion case from the Tenth Circuit, *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir. 1998)(unpublished disposition), held that corrective measures should be considered in determining whether an impairment is substantially limiting under the ADA. This Court granted *certiorari* to the Tenth Circuit on this issue in both of these cases. *See Sutton v. United Air Lines, Inc.*, 67 U.S.L.W. 3008 (Jan. 8, 1999)(No. 97-1943) and *Murphy v. United Parcel Service, Inc.*, 67 U.S.L.W. 3027 (Jan. 8, 1999)(No. 97-1992). It is noteworthy that the Tenth Circuit stands alone among the Circuit Court decisions in affirmatively holding that corrective measures should be considered in determining whether an impairment is substantially limiting.

language of the ADA. *Sutton v. United Air Lines, Inc.*, 130 F.3d at 899. Here, that guidance is both reasonable and consistent with the statute, and the Court of Appeals did not find otherwise.

Petitioner would have thought that this Court's decision in *Bragdon v. Abbott, supra*, answered the question of whether concentration is a "major life activity" under the ADA by virtue of this Court's broad interpretation of the statutory phrase. *See* Proposition I, *supra*. In a decision bereft of meaningful analysis, however, the Court of Appeals held that "concentration is not itself a major life activity." 166 F.3d at 1305; App. A-23. This holding cuts to the core of the protections afforded by the ADA for persons with psychiatric impairments and begs resolution by this Court.

It should first be noted that the determination of what constitutes a "major life activity" under the ADA is plainly a question of federal law. This was correctly recognized by the Court of Appeals. 166 F.3d at 1305, *citing Bragdon v. Abbott*, 118 S. Ct. at 2204-05; App. A-22-23.

The need to resolve this question of federal law cannot be gainsaid. Courts around the country and this Court have struggled to define the contours of the Americans with Disabilities Act. This is evident from the sheer volume of lower court decisions that continue to grapple with the basic definitions under the Act. It is particularly evident from the fact that this Court has granted *certiorari* in at least six ADA cases in its last two terms. *Bragdon v. Abbott, supra; Cleveland v. Policy Management Systems Corp.*, No. 97-1008; *Sutton v. United Air Lines, Inc.*,, No. 97-1943; *Murphy v. United Parcel Service, Inc.*, No. 97-1992; *Albertson's, Inc. v. Kirkingburg*, No. 98-591; *Olmstead v. L.C.*, No. 98-536.

Moreover, the rejection of concentration as a major life activity under the ADA serves to eviscerate the protections of the Act for individuals with many forms of mental illness. Indeed, impaired concentration is identified as a diagnostic criterion for most of the anxiety disorders, *e.g.*, posttraumatic stress disorder and obsessive-compulsive disorder, the mood disorders, *e.g.*, major depression and bi-polar disorder, and schizophrenia. *See generally Diagnostic and Statistical Manual of Mental Disorders* 4th ed. (American Psychiatric Association 1994).

Likewise, many individuals with organic brain disease would also be denied coverage under the ADA if concentration is not recognized as a major life activity. For example, an individual with Alzheimer's disease may suffer from significantly limited memory and/or concentration without yet being significantly limited in their ability to work or care for themselves. Under the decision of the Tenth Circuit, such an individual would not be covered under the ADA. Yet, few among us would argue that such an individual is not disabled as contemplated by the ADA.

This Court has not heretofore decided an employment case involving mental disability under either Title I of the ADA or the Rehabilitation Act. As is evident from the conflict between the Tenth and Eleventh Circuits and the Tenth Circuit's narrow view of "major life activity" as applied to mental impairments, guidance from this Court is sorely needed in this area. This need for guidance is underscored by the conflict between the Tenth Circuit and the EEOC's guidelines, and by the number of EEOC charges that involve emotional or psychiatric impairment. *See* note 8, *supra*. Accordingly, petitioner urges this Court to grant *certiorari* to provide guidance on this important question of federal law.

III. THIS COURT HAS PREVIOUSLY GRANTED CERTIORARI TO THE NINTH AND TENTH CIRCUITS ON THE QUESTION OF WHETHER A CLAIMED DISABILITY SHOULD BE EVALUATED WITHOUT REGARD TO MITIGATING OR CORRECTIVE MEASURES, INCLUDING MEDICATION.

Petitioner asks this Court to review the question of whether a "disability" under the ADA should be evaluated without regard to mitigating or corrective measures, including medication. Specifically, in the case of Ms. Pack, the Court of Appeals stated "we evaluate whether a physical or mental impairment is substantially limiting in a major life activity while taking into consideration any mitigating or corrective measures utilized by the individual, such as medications." 166 F.3d 1305-06 [Emphasis supplied][citing *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999)(No. 97-1943)]; App. A-24. The Court of Appeals further noted that "Pack was required to establish that she was unable to sleep or was significantly restricted as to the condition, manner, or duration of her ability to sleep... taking into consideration ... any mitigating or corrective measures. 166 F.3d at 1306 [Emphasis supplied](citations omitted); App. A-24. By noting that "Dr. Koduri was able to generally control Pack's sleep problems with medication," it is evident that the Court of Appeals evaluated Pack's sleep limitation in its medicated state. *Id.*

This Court has previously granted *certiorari* -- and by the time this petition is filed, will have heard argument -- in three separate cases raising substantially the same question. *Sutton v. United Airlines*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999)(No. 97-1943); *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir. 1998)(unpubl.), *cert. granted*, 67 U.S.L.W. 3027 (Jan. 8, 1999)(No. 97-1992); *Albertson's, Inc., v. Kirkingburg*, 143

F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999)(No. 98-591).

Petitioner adopts by reference the arguments advanced in the briefs of the petitioners and the supporting arguments articulated in the Briefs *Amicus Curiae* of the National Employment Lawyers Association in *Sutton*, 1999 WL 86487 and 86516 (No. 97-1943) and *Murphy*, 1999 WL 86488 and 86504 (No. 97-1992), and the arguments in the brief of the respondent in *Kirkingburg* (No. 98-591).

CONCLUSION

Petitioner, Teresita Pack, respectfully requests that this Court grant her Petition for Writ of Certiorari on the first question presented in order to resolve the conflict between its decision in *Bragdon v. Abbott* and the decision of the Court of Appeals in this case regarding the proper scope of the phrase "major life activity" within the meaning of the Americans with Disabilities Act. A grant of certiorari is also necessary to resolve the conflict between the Court of Appeals for the Tenth Circuit and the Court of Appeals for the Eleventh Circuit, as well as the EEOC interpretive guidelines for psychiatric disabilities.

Resolution of these conflicts is necessary to ensure that individuals with psychiatric impairments receive the full measure of protection under the ADA that Congress intended them to have. If concentration is not recognized as a major life activity under the ADA, an entire sub-class of individuals with mental impairments whom Congress intended to benefit will be denied coverage under the Act -- at least within the confines of the Tenth Circuit. No decision of this Court directly addresses the issues of mental disability in employment under the ADA or the Rehabilitation Act. Because this case cleanly presents the fundamental issue of which individuals with mental

impairments are disabled under the ADA, it is an appropriate case for this Court to begin its foray into this largely uncharted area of the law.

Petitioner further requests that her Petition be granted on the second question presented in order to preserve this issue pending this Court's decisions in *Sutton v. United Air Lines, Inc., supra, Murphy v. United Parcel Service, Inc., supra, and Albertson's, Inc. v. Kirkingburg, supra.*

Alternatively, petitioner requests that this case be remanded to the Court of Appeals for the Tenth Circuit with instructions to reconsider both questions presented in light of this Court's decisions in *Bragdon v. Abbott, supra, Sutton v. United Air Lines, Inc., supra, Murphy v. United Parcel Service, Inc., supra, and Albertson's, Inc. v. Kirkingburg, supra.*

Respectfully submitted,

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May 4, 1999

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Appendix A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TERESITA PACK, Plaintiff-Appellant, v. KMART CORPORATION, a Michigan Corporation; STEVE NICHOLAS, an individual, Defendants-Appellees. --- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Amicus Curiae.	)	No. 97-7120 FILED U. S. Court of Appeals Tenth Circuit DEC 29, 1998 PATRICK FISHER Clerk

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Appeal from United States District Court
for the Eastern District of Oklahoma
(D.C. No. 96-CV-643-B)

Steven A. Novick, Inhofe, Jorgenson & Balman, Tulsa, Oklahoma, (Douglas L. Inhofe and Mark A. Waller, on the briefs), for appellant.

Jon E. Brightmire, Doerner, Saunders, Daniel & Anderson, L.L.P., Tulsa, Oklahoma, (Kristen L. Brightmire, with him on the brief), for appellee.

Geoffrey L. Carter, Attorney, United States Equal Employment Opportunity Commission, (C. Gregory Stewart, General Counsel, Phillip B. Sklover, Associate General Counsel, Carolyn L. Wheeler, Assistent General Counsel, with him on the brief), for *amicus curiae* United State Equal Employment Opportunity Commission.

Before **BRORBY, BARRETT,** and **EBEL**, Circuit Judges.

BARRETT, Senior Circuit Judge.

Teresita Pack (Pack) appeals the district court's grant of judgment as a matter of law, pursuant to Fed. R. Civ. P. 50, in favor of Kmart Corporation (Kmart) on her Americans with Disabilities Act (ADA, 42 U.S.C. §§12101 *et seq.*, claim.[1] For the following reasons, we affirm.

Background

In 1976, Pack began her employment with Kmart in Muskogee, Oklahoma, as a dishwasher in the cafeteria. Over the next 18 years, she worked in various positions throughout the store with an excellent record. In 1987, Pack transferred

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1 Pack does not appeal from the district court's grant of judgment as a matter of law in favor of Kmart and Steve Nicholas on her intentional infliction of emotional distress claims.

to a pharmacy technician position. In late 1993, Pack began seeing her family physician, Dr. Kuykendall, for stress-related physical and emotional problems. Dr. Kuykendall in turn referred her to Dr. Koduri, a psychiatrist, who diagnosed Pack with major depression, moderate to severe, on July 8, 1994. (App Vol. II at 529-30.)

Also in late 1993, Pack's performance at work began to decline. She made technical errors in the pharmacy, including mislabeling prescriptions and incorrectly entering prescription data in the pharmacy computer. On June 22, 1994, Pack took a medical leave of absence from work until August 8, 1994. (App. Vol. II at 500.) On August 12, 1994, Pack received her annual evaluation, which was an unsatisfactory rating. *Id.* at 499. Her unsatisfactory rating was based on her errors in the pharmacy and poor concentration. *Id.* On September 9, 1994, Pack took a second medical leave of absence at the recommendation of Dr. Koduri. *Id.* at 501. Her leave was extended until January 5, 1995, at which time she returned to work with a note from Dr. Koduri restricting her to 20 hours her first week, with no restrictions thereafter.[2] *Id.* at 502. On January 11, 1995, Dr. Koduri recommended restricting Pack's hours to 32 hours per week for the next two weeks. *Id.* at 503. Upon her return, Pack continued to make prescription errors. On February 2, 1995, Kmart discharged Pack based on her continued errors as a pharmacy technician. *See* (App. Vol. I at 154.)

On December 11, 1996, Pack filed a complaint against Kmart alleging, *inter alia*, that Kmart violated the ADA when it terminated her employment on February 2, 1995.

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[2] Although the note from Dr. Koduri restricted her to 20 hours, Pack worked 40 hours her first week back in January, 1995. It is unclear, however, whether this was due to Pack's desire to work more hours and, thus, earn more or to Kmart's demands. *See* (App. Vol. I at 90-91; Vol. II at 313-14.)

(Appellee's Supp. App. at 4.) Pack alleged that she had a "nervous breakdown" in May, 1994 after which she requested a transfer as an accommodation of her disability[3] and that Kmart failed to transfer her out of her pharmacy technician position or provide other reasonable accommodation. *Id.* *See* (App. Vol. I at 12.)

On September 17, 1997, after the close of all evidence, the district court granted Kmart's oral Rule 50 motion for judgment as a matter of law. (App. Vol. II at 489.) The district court found that "periodic sleep deprivation" and "the inability to concentrate," as set forth, were not major life activities covered by the ADA. *Id.* The district court also found that: the evidence in this case showed Pack suffered from "periodic sleep deprivation on occasion," *id.*; her evidence of her inability to concentrate was "almost exclusively limited to job performance in a specific job as a pharmacy technician and the evidence does not show that [it] interferes with other aspects of her life...," *id.*; and even assuming sleep and concentration are major life activities, Pack "in this case has not demonstrated that her impairment of depression substantially limits either her concentration or her ability to sleep," *id.* at 490. The district court determined that:

> based on this record there is insufficient evidence to show an inability to perform the major life activities of sleeping and concentration. Plaintiff has offered evidence that her sleep has been disrupted on occasion, but it was not shown that it was permanent. I believe the evidence, at best, shows it was on a

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3 In her complaint, Pack identifies her "disability" as "the inability to tolerate the stressful environment created by Defendant Nicholas," a Kmart pharmacist and one of her supervisors. (Appellee's Supp. App. at 4 ¶20.) However, at trial the evidence demonstrated that Pack's alleged impairment was major depression, moderate to severe. *See* (App. Vol. II at 529-30.)

> sporadic basis. Plaintiff has further not offered any evidence that her depression has prevented her from performing totally either sleep or concentration and, in fact, the evidence is to the contrary that the plaintiff has concentrated in other areas of her lief outside of her employment in the pharmacy at Kmart, and further that there is certainly evidence that she is able to sleep even though there may be -- the sleep may be disrupted occasionally.

Id. at 490-91.

On appeal, Pack contends that the district court erred: (1) in determining that sleep and concentration are not major life activities, and (2) in concluding that reasonable jurors could not find her depression substantially limited her major life activities of sleep and concentration.

We review the district court's grant of a judgment as a matter of law *de novo*, applying the same standard as the district court. *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1450 (10th Cir. 1997)(citations and quotations omitted). Judgment as a matter of law is appropriate "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party...." Fed. R. Civ. P. 50(a)(1). "[A] court may grant the motion only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1339 (10th Cir. 1998)(internal quotation omitted.) On review, we examine the evidence in the light most favorable to Pack, extending to her the benefit of all reasonable inferences. *Id.*

Discussion

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). *See Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994)(quoting 42 U.S.C. §12112(a)), *cert. denied*, 513 U.S. 1152 (1995). Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless... the accommodation would impose an undue hardship...." 42 U.S.C. §12112(b)(5)(A). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995)(quoting 42 U.S.C. §12111(8)).

To establish a claim under the ADA, Pack must show that: (1) she is a disabled person within the meaning of the ADA; (2) she is qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation (which she must describe); and (3) Kmart discriminated against her in its employment decision (failure to transfer) because of her alleged disability.[4] *See Siemon v. AT & T Corp.*, 117F.3d 1173, 1175 (120th Cir. 1997); *White*, 45 F.3d at 360-61.

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[4] Although Pack argued Kmart discriminated against her in its failure to transfer her out of the pharmacy technician position, we will not consider this issue in view of our holding that, on the evidence presented at trial, Pack cannot demonstrate that she is a disabled person under the ADA. *See infra* Discussion.

The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2). The statutory requirement that disability determinations be made "with respect to the individual," contemplates an individualized, case-by-case determination of whether a given impairment substantially limits a major life activity of the individual. *Sutton v. United Airlnes,* 130 F.3d 893, 897-98 (10th Cir. 1997)(collecting cases), *petition for cert. filed,* 66 U.S.L.W. 3783 (U.S. Jun. 1, 1998)(No. 97-1943).

Pack alleged she was "disabled" within the meaning of subparagraph (A) because her depression is a mental impairment that substantially limits her major life activities of sleeping and concentration. Therefore, Pack was required to establish (1) that her depression is a "physical or mental impairment;" and (2) if her depression is an impairment, that it "substantially limits one or more of [her] major life activities." *See* 42 U.S.C. §12102(2)(A).

In its motion for judgment as a matter of law, Kmart conceded that depression is a mental impairment. (App. Vol. II at 375.) Therefore, for the purposes of this appeal, we assume that Pack's major depression, moderate to severe, constitutes a mental impairment within the meaning of the ADA. We must now determine whether Pack's mental impairment, major depression, "substantially limit[ed] one or more of [her] major life activities." *See* 42 U.S.C. §12102(2)(A); *Sutton,* 130 F.3d at 900.

A. Major Life Activity

Pack and the Equal Employment Opportunity Commission (EEOC), arguing as *amicus curiae,* contend that

sleep and concentration are major life activities. Pack asserts that sleep is "clearly" a major life activity as it is as significant as any activity listed in the EEOC's regulations and a basic activity that is performed with little or no difficulty by the average person in the population. (Appellant's Opening Brief at 15.) Pack reasons that concentration is also a major life activity because it is required, to some extent, in most daily activities. In addition, Pack relies on the *EEOC Guidance on Psychiatric Disabilities And the Americans With Disabilities Act,* EEOC Compliance Manual (BNA) No. 59, at E-2 (Mar. 27, 1997), which lists sleeping and concentrating as major life activities limited by mental impairments.[5] *Id.* at 16.

A "major life activity" is a basic activity that the average person in the general population can perform with little or no difficulty. Major life activities include, but are not limited to, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i); *Sutton,* 130 F.3d at 900. *See* 29 C.F.R. §1630, App. §1630.2(i)(including sitting, standing, lifting, and reaching). "[T]he touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Bragdon v. Abbott,* 118 S. Ct. 2196, 2205 (1998)(internal quotation omitted). *See Reeves v. Johnson Controls World Servs., Inc.,* 140 F.3d 144, 151 (2d Cir. 1998)("The term 'major life activit[y],' by its ordinary and natural meaning, directs us to distinguish between life activities or greater and lesser significance.").

In deciding whether a particular activity is a "major life activity," we ask whether that activity is significant within the meaning of the ADA, rather than whether that activity is

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[5] While the EEOC's guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference. *Sutton,* 130 F.3d at 899 n. 3.

important to the particular individual. "We do not think that such major life activities as seeing, hearing, or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff." *Colwell v. Suffolk County Police Dep't,* 158 F.3d 635, 642 (2d Cir. 1998)(quoting *Reeves,* 140 F.3d at 151-52). *See Bragdon,* 118 S. Ct. at 2204-05 (wherein the Court determined that reproduction is a major life activity without considering whether reproduction was an important part of the individual respondent's life).

We hold that sleeping is a major life activity, but concentration is not. Sleeping is a basic activity that the average person in the general population can perform with little or no difficulty, similar to the major life activities of walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. *See Colwell,* 158 F.3d at 643 ("... sleep, which is undoubtedly a major life activity."). However, concentration is not itself a major life activity. Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an "activity" itself.

B. Substantially Limits

We now consider whether Pack's mental impairment/depression "substantially limits" her in the major life activity of sleeping.

In order for a physical or mental impairment to be "substantially limiting," the individual must be:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or

> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. §1630.2(j)(1); *Sutton*, 130 F.3d at 900.

In determining whether an individual is substantially limited in a major life activity, three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. §1630.2(j)(2); *Sutton*, 130 F.2d at 900. In addition, we evaluate whether a physical or mental impairment is substantially limiting in a major life activity while taking into consideration any mitigating or corrective measures utilized by the individual, such as medications. *Sutton*, 130 F.3d at 902.

Thus, in order to establish that she was substantially limited in the major life activity of sleeping, Pack was required to establish that she was unable to sleep or was significantly restricted as to the condition, manner, or duration of her ability to sleep as compared to the average person in the general population, taking into consideration the three factors and any mitigating or corrective measures. *See* 29 C.F.R. §1630.2(j)(1)(i) and (ii); *Sutton*, 130 F.3d at 900-02. Pack did not allege that she was completely unable to sleep. Hence, we are concerned with Pack's ability to sleep as compared to the average person in the general population.

At trial, Pack testified that in January, 1995, "[s]ometimes I would go off into -- finally go to sleep and I would wake up shaking, crying, nervous, upset. I would be up for two or three hours before I could go back to sleep again. Sometimes I wouldn't get but two, three hours at the most sleep all night long. [sic] I would toss and turn all night long." (App. Vol. II at 316.) The only other evidence of Pack's ability or inability to sleep is found in Dr. Koduri's medical notes. On July 8, 1994, in her initial consultation with Dr. Koduri, Pack complained of "decreased sleep with increased latency, moving frequently in her sleep, [and] not feeling fresh when waking up in the morning,..." *Id.* at 529. On July 11, 1994, Dr. Koduri noted that Pack was "[s]till having significant problem with sleep, up until 2 or 3 in the morning." *Id.* at 504. On July 22, 1994, Dr. Koduri noted Pack "says that she was feeling extremely drowsy, sleepy all the time." *Id.* at 505. On July 29, 1994, Dr. Koduri noted Pack "doesn't feel as drowsy as she used to, her sleep is getting better, and even her husband has commented on her improvement." *Id.* at 506. On August 17, 1994, Dr. Koduri cut back Pack's evening medication because it "makes her too sleepy." *Id.* at 508. There are no further notations regarding sleep until November 21, 1994, when Dr. Koduri noted Pack had been having erratic sleep patterns and discussed with her the need for a structured sleep pattern. *Id.* at 517. Finally, on December 5, 1994, Dr. Koduri noted Pack's "sleep is improving a little bit." *Id.* at 518.

While the evidence showed Pack had episodes of sleep disruption and/or waking without feeling rested during 1994, there is no indication that her sleep problems were severe, long term, or had a permanent impact.[6] Dr. Koduri was able

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6 We note that the EEOC agrees that "[s]leeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully." *EEOC Guidance on Psychiatric Disabilities And the Americans With Disabilities Act*, EEOC Compliance Manual (BNA) No. 59, at E-2 n. 16 (Mar. 27, 1997). (App. Vol. II at 532.)

to generally control Pack's sleep problems with medication, even going too far in some instances, resulting in making her too sleepy or drowsy. *See id.* at 505 & 508. Additionally, Pack failed to present any evidence regarding the ability to sleep of the average person in the general population. Without this evidence, Pack did not establish she was "substantially limited" in the major life activity of sleep, because she could not compare the condition, manner, or duration of her sleep to that of the average person in the general population.[7] *See, e.g., Colwell,* 158 F.3d at 644 ("Difficulty sleeping is extremely widespread. Colwell made no showing that his affliction is any worse than is suffered by a large portion of the nation's adult population."). Therefore, the district court did not err in determining that Pack failed to show her depression substantially limited her in the major life activity of sleep.

Conclusion

We hold that sleep is a major life activity, but concentration itself is not. We further hold that Pack failed to establish she was substantially limited in the major life activity of sleeping. Thus, Pack is not disabled within the meaning of the ADA. We AFFIRM the district court's grant of judgment as a matter of law in favor of Kmart on Pack's ADA discrimination claim.

AFFIRMED.

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7 We note that the *EEOC Guidance on Psychiatric Disabilities And the Americans With Disabilities Act,* contains sleep statistics for American adults from a 1994 survey, but there is no indication that these statistics or ones similar were presented to the district court. EEOC Compliance Manual (BNA) No. 59, at E-4 n. 30 (Mar. 27, 1997). (App. Vol. II at 534.)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TERESITA PACK,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 97-7120
	)	
KMART CORPORATION, a Michigan Corporation; STEVE NICHOLAS, an individual,	)	
	)	
Defendants-Appellees.	)	
	)	
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
	)	
Amicus Curiae.	)	

ORDER
Filed February 4, 1999

Before **BRORBY, BARRETT,** and **EBEL**, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active

service as required by Fed. R. App. P. 35. As no member of the panel and no member in regular active service on the court requested that the court be polled, the suggestion is also denied.

However, in order to clarify this court's opinion filed on December 29, 1998, the original opinion is withdrawn. The court's clarified opinion is attached to this order and is filed on this date.

Entered for the Court,
Patrick Fisher, Clerk of Court

By: /s/ Keith Nelson
Keith Nelson
Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TERESITA PACK,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 97-7120
	)	
KMART CORPORATION, a Michigan Corporation; STEVE NICHOLAS, an individual,	)	FILED U.S. Court of Appeals Tenth Circuit FEB 4, 1999
Defendants-Appellees.	)	PATRICK FISHER Clerk
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Amicus Curiae.	)	

Appeal from United States District Court
for the Eastern District of Oklahoma
(D.C. No. 96-CV-643-B)

Steven A. Novick, Tulsa, Oklahoma, (Douglas L. Inhofe and Mark A. Waller, Inhofe, Jorgenson & Balman, Tulsa, Oklahoma, on the briefs), for appellant.

Jon E. Brightmire, Doerner, Saunders, Daniel & Anderson, L.L.P., Tulsa, Oklahoma, (Kristen L. Brightmire, with him on the brief), for appellee.

Geoffrey L. Carter, Attorney, United States Equal Employment Opportunity Commission, (C.Gregory Stewart, General Counsel, Phillip B. Sklover, Associate General Counsel, Carolyn L. Wheeler, Assistant General Counsel, with him on the brief), for *amicus curiae* United State Equal Employment Opportunity Commission.

Before **BRORBY, BARRETT,** and **EBEL**, Circuit Judges.

BARRETT, Senior Circuit Judge.

Teresita Pack (Pack) appeals the district court's grant of judgment as a matter of law, pursuant to Fed. R. Civ. P. 50, in favor of Kmart Corporation (Kmart) on her Americans with Disabilities Act (ADA, 42 U.S.C. §§12101 *et seq.*, claim.[1] For the following reasons, we affirm.

Background

In 1976, Pack began her employment with Kmart in Muskogee, Oklahoma, as a dishwasher in the cafeteria. Over the next 18 years, she worked in various positions throughout the store with an excellent record. In 1987, Pack transferred to a pharmacy technician position. In late 1993, Pack began seeing her family physician, Dr. Kuykendall, for stress-related physical and emotional problems. Dr. Kuykendall in

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turn referred her to Dr. Koduri, a psychiatrist, who diagnosed Pack with major depression, moderate to severe, on July 8, 1994. (App Vol. II at 529-30.)

Also in late 1993, Pack's performance at work began to decline. She made technical errors in the pharmacy, including mislabeling prescriptions and incorrectly entering prescription data in the pharmacy computer. On June 22, 1994, Pack took a medical leave of absence from work until August 8, 1994. (App. Vol. II at 500.) On August 12, 1994, Pack received her annual evaluation, which was an unsatisfactory rating. *Id.* at 499. Her unsatisfactory rating was based on her errors in the pharmacy and poor concentration. *Id.* On September 9, 1994, Pack took a second medical leave of absence at the recommendation of Dr. Koduri. *Id.* at 501. Her leave was extended until January 5, 1995, at which time she returned to work with a note from Dr. Koduri restricting her to 20 hours her first week, with no restrictions thereafter.[2] *Id.* at 502. On January 11, 1995, Dr. Koduri recommended restricting Pack's hours to 32 hours per week for the next two weeks. *Id.* at 503. Upon her return, Pack continued to make prescription errors. On February 2, 1995, Kmart discharged Pack based on her continued errors as a pharmacy technician. *See* (App. Vol. I at 154.)

On December 11, 1996, Pack filed a complaint against Kmart alleging, *inter alia*, that Kmart violated the ADA when it terminated her employment on February 2, 1995. (Appellee's Supp. App. at 4.) Pack alleged that she had a "nervous breakdown" in May, 1994 after which she

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2 Although the note from Dr. Koduri restricted her to 20 hours, Pack worked 40 hours her first week back in January, 1995. It is unclear, however, whether this was due to Pack's desire to work more hours and, thus, earn more or to Kmart's demands. *See* (App. Vol. I at 90-91; Vol. II at 313-14.)

requested a transfer as an accommodation of her disability[3] and that Kmart failed to transfer her out of her pharmacy technician position or provide other reasonable accommodation. *Id.* *See* (App. Vol. I at 12.)

On September 17, 1997, after the close of all evidence, the district court granted Kmart's oral Rule 50 motion for judgment as a matter of law. (App. Vol. II at 489.) The district court found that "periodic sleep deprivation" and "the inability to concentrate," as set forth, were not major life activities covered by the ADA. *Id.* The district court also found that: the evidence in this case showed Pack suffered from "periodic sleep deprivation on occasion," *id.*; her evidence of her inability to concentrate was "almost exclusively limited to job performance in a specific job as a pharmacy technician and the evidence does not show that [it] interferes with other aspects of her life...," *id.*; and even assuming sleep and concentration are major life activities, Pack "in this case has not demonstrated that her impairment of depression substantially limits either her concentration or her ability to sleep," *id.* at 490. The district court determined that:

> based on this record there is insufficient evidence to show an inability to perform the major life activities of sleeping and concentration. Plaintiff has offered evidence that her sleep has been disrupted on occasion, but it was not shown that it was permanent. I believe the evidence, at best, shows it was on a sporadic basis. Plaintiff has further not offered any evidence that her depression has

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3 In her complaint, Pack identifies her "disability" as "the inability to tolerate the stressful environment created by Defendant Nicholas," a Kmart pharmacist and one of her supervisors. (Appellee's Supp. App. at 4 ¶20.) However, at trial the evidence demonstrated that Pack's alleged impairment was major depression, moderate to severe. *See* (App. Vol. II at 529-30.)

> prevented her from performing totally either sleep or concentration and, in fact, the evidence is to the contrary that the plaintiff has concentrated in other areas of her lief outside of her employment in the pharmacy at Kmart, and further that there is certainly evidence that she is able to sleep even though there may be -- the sleep may be disrupted occasionally.

Id. at 490-91.

On appeal, Pack contends that the district court erred: (1) in determining that sleep and concentration are not major life activities, and (2) in concluding that reasonable jurors could not find her depression substantially limited her major life activities of sleep and concentration.

We review the district court's grant of a judgment as a matter of law *de novo*, applying the same standard as the district court. *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1450 (10th Cir. 1997)(citations and quotations omitted). Judgment as a matter of law is appropriate "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party...." Fed. R. Civ. P. 50(a)(1). "[A] court may grant the motion only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1339 (10th Cir. 1998)(internal quotation omitted.) On review, we examine the evidence in the light most favorable to Pack, extending to her the benefit of all reasonable inferences. *Id.*

Discussion

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). *See Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994)(quoting 42 U.S.C. §12112(a)), *cert. denied*, 513 U.S. 1152 (1995). Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless... the accommodation would impose an undue hardship...." 42 U.S.C. §12112(b)(5)(A). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995)(quoting 42 U.S.C. §12111(8)).

To establish a claim under the ADA, Pack must show that: (1) she is a disabled person within the meaning of the ADA; (2) she is qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation (which she must describe); and (3) Kmart discriminated against her in its employment decision (failure to transfer) because of her alleged disability.[4] *See Siemon v. AT & T Corp.*, 117F.3d 1173, 1175 (120th Cir. 1997); *White*, 45 F.3d at 360-61.

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[4] Although Pack argued Kmart discriminated against her in its failure to transfer her out of the pharmacy technician position, we will not consider this issue in view of our holding that, on the evidence presented at trial, Pack cannot demonstrate that she is a disabled person under the ADA. *See infra* Discussion.

The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2). The statutory requirement that disability determinations be made "with respect to the individual," contemplates an individualized, case-by-case determination of whether a given impairment substantially limits a major life activity of the individual. *Sutton v. United Airlnes,* 130 F.3d 893, 897-98 (10th Cir. 1997)(collecting cases), *petition for cert. filed,* 66 U.S.L.W. 3783 (U.S. Jun. 1, 1998)(No. 97-1943).

Pack alleged she was "disabled" within the meaning of subparagraph (A) because her depression is a mental impairment that substantially limits her major life activities of sleeping and concentration. Therefore, Pack was required to establish (1) that her depression is a "physical or mental impairment;" and (2) if her depression is an impairment, that it "substantially limits one or more of [her] major life activities." *See* 42 U.S.C. §12102(2)(A).

In its motion for judgment as a matter of law, Kmart conceded that depression is a mental impairment. (App. Vol. II at 375.) Therefore, for the purposes of this appeal, we assume that Pack's major depression, moderate to severe, constitutes a mental impairment within the meaning of the ADA. We must now determine whether Pack's mental impairment, major depression, "substantially limit[ed] one or more of [her] major life activities." *See* 42 U.S.C. §12102(2)(A); *Sutton,* 130 F.3d at 900.

A. Major Life Activity

Pack and the Equal Employment Opportunity Commission (EEOC), arguing as *amicus curiae,* contend that

sleep and concentration are major life activities. Pack asserts that sleep is "clearly" a major life activity as it is as significant as any activity listed in the EEOC's regulations and a basic activity that is performed with little or no difficulty by the average person in the population. (Appellant's Opening Brief at 15.) Pack reasons that concentration is also a major life activity because it is required, to some extent, in most daily activities. In addition, Pack relies on the *EEOC Guidance on Psychiatric Disabilities And the Americans With Disabilities Act,* EEOC Compliance Manual (BNA) No. 59, at E-2 (Mar. 27, 1997), which lists sleeping and concentrating as major life activities limited by mental impairments.[5] *Id.* at 16.

A "major life activity" is a basic activity that the average person in the general population can perform with little or no difficulty. Major life activities include, but are not limited to, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i); *Sutton,* 130 F.3d at 900. *See* 29 C.F.R. §1630, App. §1630.2(i)(including sitting, standing, lifting, and reaching). "[T]he touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Bragdon v. Abbott,* 118 S. Ct. 2196, 2205 (1998)(internal quotation omitted). *See Reeves v. Johnson Controls World Servs., Inc.,* 140 F.3d 144, 151 (2d Cir. 1998)("The term 'major life activit[y],' by its ordinary and natural meaning, directs us to distinguish between life activities or greater and lesser significance.").

In deciding whether a particular activity is a "major life activity," we ask whether that activity is significant within the meaning of the ADA, rather than whether that activity is

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5 While the EEOC's guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference. *Sutton,* 130 F.3d at 899 n. 3.

important to the particular individual. "We do not think that such major life activities as seeing, hearing, or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff." *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642 (2d Cir. 1998)(quoting *Reeves*, 140 F.3d at 151-52). *See Bragdon*, 118 S. Ct. at 2204-05 (wherein the Court determined that reproduction is a major life activity without considering whether reproduction was an important part of the individual respondent's life).

We hold that sleeping is a major life activity, but concentration is not. Sleeping is a basic activity that the average person in the general population can perform with little or no difficulty, similar to the major life activities of walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, and reaching. *See Colwell*, 158 F.3d at 643 ("... sleep, which is undoubtedly a major life activity."). However, concentration is not itself a major life activity. Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an "activity" itself.

B. Substantially Limits

We now consider whether Pack's mental impairment/depression "substantially limits" her in the major life activity of sleeping.

In order for a physical or mental impairment to be "substantially limiting," the individual must be:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or

> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. §1630.2(j)(1); *Sutton,* 130 F.3d at 900.

In determining whether an individual is substantially limited in a major life activity, three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. §1630.2(j)(2); *Sutton,* 130 F.2d at 900. In addition, we evaluate whether a physical or mental impairment is substantially limiting in a major life activity while taking into consideration any mitigating or corrective measures utilized by the individual, such as medications. *Sutton,* 130 F.3d at 902.

Thus, in order to establish that she was substantially limited in the major life activity of sleeping, Pack was required to establish that she was unable to sleep or was significantly restricted as to the condition, manner, or duration of her ability to sleep as compared to the average person in the general population, taking into consideration the three factors and any mitigating or corrective measures. *See* 29 C.F.R. §1630.2(j)(1)(i) and (ii); *Sutton,* 130 F.3d at 900-02. Pack did not allege that she was completely unable to sleep. Hence, we are concerned with Pack's ability to sleep as compared to the average person in the general population.

At trial, Pack testified that in January, 1995, "[s]ometimes I would go off into -- finally go to sleep and I would wake up shaking, crying, nervous, upset. I would be up for two or three hours before I could go back to sleep again. Sometimes I wouldn't get but two, three hours at the most sleep all night long. [sic] I would toss and turn all night long." (App. Vol. II at 316.) The only other evidence of Pack's ability or inability to sleep is found in Dr. Koduri's medical notes. On July 8, 1994, in her initial consultation with Dr. Koduri, Pack complained of "decreased sleep with increased latency, moving frequently in her sleep, [and] not feeling fresh when waking up in the morning,..." *Id.* at 529. On July 11, 1994, Dr. Koduri noted that Pack was "[s]till having significant problem with sleep, up until 2 or 3 in the morning." *Id.* at 504. On July 22, 1994, Dr. Koduri noted Pack "says that she was feeling extremely drowsy, sleepy all the time." *Id.* at 505. On July 29, 1994, Dr. Koduri noted Pack "doesn't feel as drowsy as she used to, her sleep is getting better, and even her husband has commented on her improvement." *Id.* at 506. On August 17, 1994, Dr. Koduri cut back Pack's evening medication because it "makes her too sleepy." *Id.* at 508. There are no further notations regarding sleep until November 21, 1994, when Dr. Koduri noted Pack had been having erratic sleep patterns and discussed with her the need for a structured sleep pattern. *Id.* at 517. Finally, on December 5, 1994, Dr. Koduri noted Pack's "sleep is improving a little bit." *Id.* at 518.

While the evidence showed Pack had episodes of sleep disruption and/or waking without feeling rested during 1994 and January 1995, there is no indication that her sleep problems were severe, long term, or had a permanent impact.[6] Additionally, Dr. Koduri was able to generally

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[6] We note that the EEOC agrees that "[s]leeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully." *EEOC Guidance on Psychiatric Disabilities And the Americans With Disabilities Act*, EEOC Compliance

control Pack's sleep problems with medication, even going too far in some instances, resulting in making her too sleepy or drowsy. *See id.* at 505 & 508. Pack failed to satisfy her burden to present evidence of her impairment and the extent to which the impairment limited her major life activity of sleeping. Therefore, the district court did not err in determining that Pack failed to show her depression substantially limited her in the major life activity of sleep.

Conclusion

We hold that sleep is a major life activity, but concentration itself is not. We further hold that Pack failed to establish she was substantially limited in the major life activity of sleeping. Thus, Pack is not disabled within the meaning of the ADA. We AFFIRM the district court's grant of judgment as a matter of law in favor of Kmart on Pack's ADA discrimination claim.[7]

AFFIRMED.

Manual (BNA) No. 59, at E-2 n. 16 (Mar. 27, 1997). (App. Vol. II at 532.)

[7] Additionally, we note that Pack failed to present any evidence regarding the ability to sleep of the average person in the general population which would have significantly aided the trier of fact in a situation like this where there is a dearth of other evidence. *See, e.g., Colwell,* 158 F.3d at 644 ("Difficulty sleeping is extremely widespread. Colwell made no showing that his affliction is any worse than is suffered by a large portion of the nation's adult population.").

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

TERESITA PACK, an individual,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 96-CV-643-B
	)	
KMART CORPORATION, a Michigan corporation, and STEVE NICHOLAS, an individual,	)	
	)	
Defendants.	)	

VOLUME II of II

TRANSCRIPT OF TRIAL (EXCERPT)

BEFORE THE HONORABLE MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE, and a jury

SEPTEMBER 17, 1997

THE COURT: I'll take a brief recess and be back and give you a ruling on the Rule 50 motions.

(SHORT RECESS)

(COURT IN SESSION)

THE COURT: The Court has considered the defendant's Rule 50 motions and finds that the Rule 50 motion will be sustained as to the A.D.A. claim. To prevail on the A.D.A. claim the plaintiff must demonstrate that she

suffers from a disability which is defined as a mental impairment that substantially limits one or more of the major life activities of the individual as defined at 42 U.S.C. Section 12102. The evidence in this case is that the plaintiff has suffered from periodic sleep deprivation on occasion. The Court finds that periodic sleep deprivation, as set forth in this case, is not a major life activity covered by the A.D.A. With regard to the evidence on the ability to concentrate, the evidence is almost exclusively limited to job performance in a specific job as a pharmacy technician and the evidence does not show that this, quote, "inability to concentrate," interferes with other aspects of her life and therefore, the inability to concentrate, as set forth in this case, the Court finds is not a major life activity covered by the A.D.A.

Further, with regard to the E.E.O.C. compliance manual, the Court is not bound by that manual. However, going a step further in considering this case, even if -- if you want to put just the general category of concentration or sleep as a major life activity, the plaintiff in this case has not demonstrated that her impairment of depression substantially limits either her concentration. or her ability to sleep. Substantially limits means that the plaintiff is, one, unable to perform a major life activity that the average person in the general population can perform or two, significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

In determining whether an individual is substantially limited, the Court should consider, one, the nature and severity of the impairment; two, the duration or expected duration of the impairment; and, three, the permanent or long-term impact with the expected permanent or long - term impact

of or resulting from the impairment. Those are the considerations set out in CFR -- 29 CFR Section 1630.2(j)(2).

The Court is of the opinion that based on this record there is insufficient evidence to show an inability to perform the major life activities of sleeping and concentration. Plaintiff has offered evidence that her sleep has been disrupted on occasion, but it was not shown that it was permanent. I believe the evidence, at best, shows it was on a sporadic basis. Plaintiff has further not offered any evidence that her depression has prevented her from performing totally either sleep or concentration and, in fact, the evidence is to the contrary that the plaintiff has concentrated in other areas of her life outside of her employment in the pharmacy at Kmart, and further that there is certainly evidence that she is able to sleep even though there may be -- the sleep may be disrupted occasionally.

The other avenue of recovery is that plaintiff's sleeping and concentration are significantly restricted and for this analysis the Court centers on whether the person can perform the normal activities of daily living and the plaintiff has not demonstrated that her daily activities were significantly restricted, only that they were disrupted to some degree. The testimony regarding the ability to concentrate was almost exclusively limited to her ability to concentrate at the work instead of other aspects of her life. This is simply insufficient to maintain plaintiff's burden under the ADA.

Plaintiff has not related her alleged impediment, her sleeping and concentration, to the average person in the population, either through her testimony or through the testimony of her doctor, Dr. Koduri.

Additionally, this Court has considered the factors under Section 1630.2(j)(2)and finds that the evidence indicates the severity of the impairment is limited, the duration of the

impairment was temporary, and that the impact arising from the impairment has not been demonstrated by the plaintiff to be permanent or long-term. Therefore, the plaintiff has not sustained her burden to prove that she suffers from a disability as that term is defined by the ADA.

With regard to the intentional infliction of emotional distress claim, the Court sustains the Rule 50 motion on that claim. To prevail on plaintiff's intentional infliction claim, the plaintiff must prove the actions by the defendants were so extreme and outrageous as to go beyond all possible bounds of decency and would be considered atrocious and utterly intolerable in a civilized society. That's the standard set forth in Eddie versus Brown, 715 Pacific 2nd 74. Mere insults, indignities, threats, annoyances, petty oppression are not sufficient to maintain an action for intentional infliction. This Court presumes for the purpose of this Rule 50 motion that Defendant Nicholas engaged in the actions alleged by plaintiff, recognizing that a dispute in the evidence has been presented, but given this, his actions, though they may have been unnecessary and they may have been rude, do not rise to the extreme level required to maintain an intentional infliction claim. His insults and activities, if they did occur, and the Court is assuming for the Rule 50 motion that they did, do not go beyond all possible bounds of decency and cannot be considered as utterly intolerable. Thus, the Rule 50 motion is sustained against the Defendant Nicholas.

This same claim against the Defendant Kmart is also lacking. Since the actions of Nicholas do not rise to the required level of severity, Kmart's inactions in dealing with Nicholas or Nicholas's conduct is not actionable. Consequently, based upon the finding with regard to Nicholas, the Rule 50 motion on the intentional infliction of emotional distress is sustained as to Kmart.

It is ordered that each party is directed to withdraw their respective trial exhibits with same to be kept, and maintained for possible appeal purposes.

Is there anything else that you need to take up with the Court before we recess, from the plaintiff?

MR. WALLER: Not that I can think of.

THE COURT: All right. From the defendant?

MS. BRIGHTMIRE: Nothing from the defendants.

THE COURT: All right. Thank you very much.

(END OF PROCEEDINGS)

Supreme Court, U. S.
F I L E D
JUN 4 1999
CLERK

No. 98-1784

IN THE

Supreme Court of the United States

TERESITA PACK,

Petitioner,

v.

KMART CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Kmart Corporation has no parent corporations and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Background Facts

Petitioner Teresita Pack became employed by Respondent Kmart Corporation in 1976 in its Muskogee, Oklahoma retail store. After working in various positions over the next several years, in 1987 Ms. Pack accepted a pharmacy technician position with Kmart.

As the Court of Appeals noted, in late 1993 Ms. Pack's work performance began to decline. She began making errors in the pharmacy, including mislabeling prescriptions and incorrectly entering prescription data in the pharmacy computer. *Pack v. Kmart Corp.*, 166 F.3d 1300, 1302 (10th Cir. 1999).[1]

In late 1993 Ms. Pack began seeing her family physician for stress related problems. Her physician referred her to Dr. Koduri, a psychiatrist. Dr. Koduri first examined Ms. Pack in July 1994 and observed symptoms such as decreased attention/concentration. He diagnosed her with moderate to severe depression and prescribed antidepressants.

Prior to her initial consultation with Dr. Koduri, on June 22, 1994, Ms. Pack, with Kmart's approval, took a medical leave of absence from work. She returned to work on August 8, 1994, with no restrictions. On September 9, 1994, Ms.

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1. Ms. Pack states in her Petition that she had "an excellent work record" while employed with Kmart. Petition at 2. However, as correctly noted by the Court of Appeals, the annual evaluation Ms. Pack received on August 12, 1994, reflected an unsatisfactory rating as a result of her errors and her poor performance in the pharmacy. 166 F.3d at 1302.

Pack took a second medical leave of absence at the recommendation of Dr. Koduri, also with Kmart's approval. Her leave extended until January 5, 1995. At that time she returned to work with a note from Dr. Koduri clearing her return with no restrictions other than fewer hours for her first few weeks.

Upon her return to work Ms. Pack continued to make prescription errors. As a result of these errors, on February 2, 1995, Kmart discharged her.

B. Course of Proceedings and Disposition Below

Ms. Pack filed this action in December 1996 against Kmart and one of its pharmacists, Stephen Nicholas. Ms. Pack asserted Kmart was liable to her for (1) failing to accommodate her disability in violation of the Americans with Disabilities Act ("ADA"); (2) discharging her in violation of the Age Discrimination In Employment Act ("ADEA"); (3) discharging her in violation of Title VII's prohibition of gender-based discrimination; and (4) intentional infliction of emotional distress. Ms. Pack asserted the last claim against Mr. Nicholas as well. Prior to trial Ms. Pack voluntarily dismissed her ADEA and Title VII claims.

The case proceeded to jury trial on the ADA and intentional infliction of emotional distress claims. With respect to her ADA claim, Ms. Pack asserted she suffered from major depression, a mental impairment, and the depression substantially limited her in the major life activities of sleeping and concentrating. Ms. Pack further asserted Kmart failed to provide a reasonable accommodation for her alleged disability in the form of a transfer to a different department.

After presentation of all the evidence, Kmart and Mr. Nicholas moved for a directed verdict in accordance with Fed. R. Civ. P. 50. Concerning Ms. Pack's ADA claim, the District Court held that sleeping and concentrating are not major life activities. The District Court further held that even if sleeping and concentrating were major life activities, Ms. Pack failed to present evidence from which a reasonable juror could conclude her mental impairment substantially limited her in these major life activities. Based upon these holdings, the District Court did not address Kmart's other arguments in support of its motion for directed verdict on Ms. Pack's ADA claim.[2] The District Court granted Kmart a directed verdict on the ADA claim, and granted Kmart and Mr. Nicholas a directed verdict on Ms. Pack's intentional infliction of emotional distress claim, and entered judgment accordingly.

Ms. Pack appealed only that part of the District Court's judgment directing a verdict in Kmart's favor on her ADA claim. The Court of Appeals held that sleeping is a major life activity, but that concentrating is not. The Court of Appeals then held that Ms. Pack failed to present sufficient evidence from which a reasonable juror could conclude that her mental impairment (major depression, moderate to

2. Kmart also contended it was entitled to a directed verdict on the grounds that (1) Ms. Pack failed to present sufficient evidence from which a reasonable juror could conclude that in January 1995 she as a "qualified individual with a disability," that is, an individual with a disability who, with or without a reasonable accommodation, could perform the essential functions of her job as a pharmacy technician; and (2) Ms. Pack failed to present sufficient evidence from which a reasonable juror could conclude that Kmart had knowledge after January 5, 1995 (the date Ms. Pack returned to work from a medical leave of absence) of a limitation requiring an accommodation.

severe) substantially limited her in the major life activity of sleeping. Accordingly, the Court of Appeals affirmed the District Court's judgment.

Because the Court of Appeals held that concentrating is not a major life activity, and that Ms. Pack did not present legally sufficient evidence that her mental impairment substantially limited the major life activity of sleeping, the Court of Appeals did not address the other arguments presented by Kmart for affirmance of the District Court's judgment.[3]

C. The Petition for a Writ of Certiorari

Ms. Pack requests this Court grant certiorari to review the opinion of the Court of Appeals. Ms. Pack contends that, with respect to the Court of Appeals' determination that concentrating is not a major life activity, (1) the Court of Appeals' decision is in conflict with this Court's decision in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), and (2) the Court of Appeals' decision is in conflict with the decision of the Eleventh Circuit in *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997), and regulatory guidelines promulgated by the Equal

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3. In its Answer Brief in the Court of Appeals, Kmart contended the District Court's judgment should be affirmed, in addition to the grounds relied upon by the Court of Appeals, because (1) Ms. Pack did not provide sufficient evidence from which a reasonable juror could conclude she was "substantially limited" in the ability to concentrate; (2) Ms. Pack did not present evidence she was a qualified individual with a disability; and (3) even if Ms. Pack were a qualified individual with a disability, Kmart was not required to accommodate her because Kmart did not have any knowledge that she required an accomodation after she returned to work in January 1995 from her medical leave of absence.

Employment Opportunity Commission. Further, Ms. Pack contends the Court of Appeals improperly determined that a claimed disability should be evaluated taking into consideration mitigating or corrective measures, such as medication, an issue Ms. Pack correctly notes is presently before this Court on certiorari to the Ninth and Tenth Circuits.

None of the reasons stated in the Petition provides this Court with a compelling reason to exercise its discretion to grant certiorari in this case.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION THAT CONCENTRATING IS NOT A MAJOR LIFE ACTIVITY UNDER THE ADA DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *BRAGDON* THAT REPRODUCTION IS A MAJOR LIFE ACTIVITY.

In Proposition I of her Petition, Ms. Pack seeks certiorari review on the basis that the Court of Appeals' decision conflicts with this Court's decision in *Bragdon* regarding the scope of major life activities under the ADA. Certiorari review on this basis should be denied. First, in determining that concentrating is not a major life activity, the Court of Appeals stated the proper rules of law as set forth in *Bragdon* and the ADA. Second, the Court of Appeals did not misapply the rules of law, and correctly determined that while concentrating may be a significant and necessary component of a major life activity, it is not an activity in and of itself. Third, the Court of Appeals' decision is supported by the analysis set forth by the First

Circuit for determining whether an activity is a major life activity under the ADA, an analysis which is consistent with this Court's approach in *Bragdon*. Finally, certiorari review should be denied because, even if concentration is a major life activity, there was insufficient evidence at trial from which a reasonable juror could conclude Ms. Pack was "substantially limited" in the ability to concentrate, and therefore Ms. Pack still cannot prevail on appeal.

Each of these reasons for denying Ms. Pack certiorari review under Proposition I of her Petition is discussed separately below.

A. The Court of Appeals stated the proper rules of law as set forth in *Bragdon* and the ADA.

Ms. Pack contends the Court of Appeals' decision conflicts with this Court's decision in *Bragdon* regarding the scope of major life activities. *Bragdon*, which was decided over seven months prior to the Court of Appeals' decision in this case, was cited and relied upon by the Court of Appeals it in its determination of the issues before it. Ms. Pack's first argument in support of granting a writ of certiorari amounts to nothing more than a complaint that the Court of Appeals, in determining that concentrating is not a major life activity, misapplied a properly stated rule of law. Certiorari "is rarely granted" on this basis. *See* Sup. Ct. R. 10 ("[c]ertiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

The issue in *Bragdon* pertinent here was whether the activity of reproduction is a major life activity. This Court stated:

> We have little difficulty concluding that it is. As the Court of Appeals held, "[t]he plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." 107 F.3d at 939, 940. Reproduction falls well within the phrase "major life activity." Reproduction and the sexual dynamics surrounding it are central to the life process itself.

Id., 118 S. Ct. at 2205. In so holding, this Court rejected the *Bragdon* petitioner's claim that Congress intended the ADA to cover only those aspects of a person's life which have a public, economic, or daily character. *Id.* This Court also noted that the ADA must be construed consistent with the regulations issued to implement the Rehabilitation Act, 42 U.S.C. § 12201(a), and that rather than enunciating a general principle for determining what is or is not a major life activity, the Rehabilitation Act regulations instead provide only a representative list. *Id.* Finally, in *Bragdon* this Court determined that reproduction is a major life activity without considering whether that activity was an important part of the individual ADA claimant's life. *Id.* at 2204-05. These were the precise rules of law set forth by this Court in *Bragdon* in holding reproduction is a major life activity under the ADA.

The rules of law set forth in *Bragdon* were dutifully applied by the Court of Appeals in this case. The Court of Appeals quoted *Bragdon's* teaching that "the touchstone for determining an activity's inclusion under the statutory rubric is its significance." 166 F.3d at 1305 (quoting

Bragdon, 118 S. Ct. at 2205). The Court of Appeals did not apply the test rejected by *Bragdon* that an activity must have some public, economic, or daily character to be a major life activity. Like this Court in *Bragdon*, the Court of Appeals noted that major life activities "include, but are not limited to" those set forth in the EEOC regulations. 166 F.3d at 1305. Finally, as Ms. Pack concedes, the Court of Appeals properly concluded that "[i]n deciding whether a particular activity is a 'major life activity,' we ask whether that activity is significant within the meaning of the ADA, rather than whether that activity is important to the particular individual." *Id.* (citing *Bragdon*, 118 S. Ct. at 2204-05). *See* Petition at 6, n.3.

In addition to properly setting forth the legal guideposts gleaned from *Bragdon*, the Court of Appeals properly stated the applicable statutory rules governing Ms. Pack's claim. Ms. Pack does not argue otherwise. *See* Petition at 4 ("[a]fter reciting the controlling principles governing the ADA . . .").

Thus, Ms. Pack is left to argue the Court of Appeals misapplied properly stated rules of law. Under this Court's rules, misapplication of properly stated rules of law is not a compelling reason to grant certiorari review.

B. The Court of Appeals did not misapply the governing rules of law, and correctly determined that while concentrating may be a significant and necessary component of a major life activity, it is not an "activity" in and of itself.

In determining that concentrating is not a major life activity, the Court of Appeals stated: "[c]oncentration may be a significant and necessary component of a major life

activity, such as working, learning, or speaking, but it is not an 'activity' itself." 166 F.3d at 1305. The Court of Appeals' decision is correct.

Ms. Pack contends the Court of Appeals' decision "advances no credible rationale for concluding that concentration is not a major life activity." Petition at 7. Contrary to Ms. Pack's contention, the Court of Appeals advanced the rationale that concentrating is not an activity in and of itself, but rather is a component, or function, of major life activities. Because application of the ADA is limited to physical or mental impairments which substantially limit "major life activities," not "major life functions" or "components" of major life activities, the conclusion of the Court of Appeals is correct and its reasoning is sound.

The plain difference between the definition of "activity" and the definition of "function" supports the Court of Appeals' decision. "Activity" is defined as "[t]he state or quality of being active; action; vigorous movement; active force or operation." *Funk & Wagnalls New Comprehensive International Dictionary of the English Language* (1982). "Function" is defined as "[t]he proper employment of faculties or powers." *Id.* There is, plainly, a difference between an "activity" and a "function". Concentrating is a mental faculty. While the proper employment of the faculty of concentrating, *i.e.*, the function of concentrating, may be necessary to engage in an activity, there is nothing active about concentrating in and of itself.

That is not to say something cannot be both an activity in and of itself as well as a function or component of another activity. The examples cited by Ms. Pack in the Petition

are illustrative. Thus, standing is an activity in and of itself, and is also a function or component of walking. But concentrating cannot stand alone as an activity. Concentrating cannot take place in a vacuum. It can only be a function of an activity. One does not go "to concentrate" for the sake of concentrating. Rather, one concentrates on the activity in which one is engaged. Even if the activity is "mental" (such as thinking or pondering) concentrating is simply a component, a component which enables one to focus on whatever subject is on the person's mind. But again, concentrating is not in and of itself an "activity" in which a person solely engages.

Ms. Pack helps bring home this distinction when she proposes that concentrating should be a major life activity because it is "one of our most basic cognitive *functions*." Petition at 8 (emphasis added). Ms. Pack then directs the Court's attention to articles and studies on attention deficit disorders and the like. *Id.* at 9. But what these articles and studies show is that the inability to properly employ the faculty of concentrating is symptomatic to the diagnosis of a mental impairment. For instance, it is a child's inability to concentrate which leads to the diagnosis of ADD, not the fact a child has ADD which limits the ability to concentrate. In turn, the inability of a child to concentrate — the impairment of ADD — is what limits the ability of a child to engage in major life activities.[4]

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4. Indeed, in this case Ms. Pack's psychiatrist diagnosed her as having major depression, moderate to severe, based in part on his initial observation that she had "decreased attention/ concentration," one of the symptoms of her mental impairment. As noted in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed. 1994), the

(Cont'd)

Ms. Pack further helps draw this distinction when she states to concentrate is to "employ all one's thoughts or attention or effort *on something*." Petition at 9 (citing *Oxford American Dictionary* (Oxford 1980)) (emphasis added). That "something" is the activity in which the person is engaged. One can examine each of the major life activities listed in the EEOC regulations — caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working, *see* 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2)(1997) — and see that the ability to concentrate is a component in each. However, the ability to concentrate is not an activity in and of itself.

Accordingly, the Court of Appeals properly applied the governing rules of law in determining that while concentrating may be a significant and necessary component of a major life activity, it is not a major life activity under the ADA.

(Cont'd)
diminished ability to concentrate is one of the criteria for a diagnosis of major depression. *Id.* at p. 327. If the function of concentrating is both a symptom resulting in the diagnosis of impairment as well as the major life activity, the three-step process outlined in *Bragdon* for determining the existence of a disability — (1) whether there is a physical or mental impairment (2) that substantially limits (3) a major life activity — would be collapsed into one step—the determination of the impairment. Nothing in *Bragdon* or in the ADA remotely suggests that the disability inquiry should begin and end with the simple finding of an impairment.

C. The First Circuit's analysis in *Soileau v. Guilford of Maine, Inc.* also provides a sound basis for determining concentrating is not a major life activity under the ADA.

Although not relied upon by the Court of Appeals in this case, the First Circuit's analysis in *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997), provides a sound basis for supporting the conclusion that concentrating is not a major life activity under the ADA. In *Soileau* the First Circuit rejected one of the newly expanded major life activities listed in the *Guidance on Psychiatric Disabilities and the Americans with Disabilities Act*, EEOC Compliance Manual (BNA) No. 59 (March 27, 1997) ("EEOC Guidance"), that of "interacting with others." In doing so, the First Circuit provided the following analysis:

> The concept of "ability to get along with others" is remarkably elastic, perhaps so much so as to make it unworkable as a definition. While such an ability is a skill to be prized, it is different in kind from breathing or walking, two exemplars which are used in the regulations. Further, whether a person has such an ability may be a matter of subjective judgment; and the ability may or may not exist depending on context. Here, Soileau's alleged inability to interact with others came and went and was triggered by vicissitudes of life which are normally stressful for ordinary people — losing a girlfriend or being criticized by a supervisor.

105 F.3d at 15.

Applying the same analysis here, it is equally clear the EEOC Guidance's inclusion of concentrating as a major

life activity should be rejected as well. Like "interaction with others," the concept of concentrating is elastic, and the ability of a person to concentrate on an activity is a matter of subjective judgment and is affected by day-to-day occurrences stressful to ordinary people.

Again, the definition of "concentration" is to direct one's attention or thoughts on something. The term "concentration" is at least equally elastic and amorphous a concept as "the ability to interact with others." Indeed, under the facts presented at trial in this case, Ms. Pack's alleged inability to concentrate came and went and was "triggered by vicissitudes of life which are normally stressful for ordinary people" — here, admitted family problems and criticism by her supervisor at work.

From our everyday experiences we know we are able to concentrate better on some days than others, for a wide variety of reasons. And the level of concentration needed varies greatly from activity to activity. But the ability to concentrate and the level at which one is concentrating are such elastic concepts that concentrating should not be deemed a major life activity under the ADA.

D. This Court should deny certiorari review because, even if Ms. Pack is granted the relief she seeks, she still cannot prevail on appeal. There was insufficient evidence at trial from which a reasonable juror could conclude Ms. Pack was "substantially limited" in the ability to concentrate.

Assuming concentrating is a major life activity, Ms. Pack did not present legally sufficient evidence that her mental impairment "substantially limited" her ability to

concentrate. Therefore, certiorari review should be denied because the District Court's directed verdict should still be affirmed.

The relevant ADA regulations state an individual is substantially limited when he or she is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). The factors to be considered in determining whether an individual is substantially limited in a major life activity are (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long-term impact, of or resulting from the impairment. *Id.* § 1630.2(j)(2). The District Court and the Court of Appeals properly applied these factors in their respective decisions. 166 F.3d at 1305.

Tellingly, Ms. Pack states in her Petition:

> Any concern that the ability to concentrate cannot be adequately measured for comparison to the average in the general population is

> misplaced. The ability to concentrate can be reasonably evaluated with a variety of reliable psychological tests, most notably the Wechsler Adult Intelligence Scale-Revised (WAIS-R).

Petition at 9, n.6 (citations omitted). *Yet, Ms. Pack presented no evidence at trial measuring her ability to concentrate as compared to the average person in the general population.* While she had every opportunity to present such evidence at trial, she did not. It is far too late to state that evidence sufficient to make out a prima facie case *could* be gathered and offered, when trial has concluded and such evidence was not presented.[5]

Further, Ms. Pack's expert's notes from his visit with Ms. Pack on December 30, 1994 (shortly before her return to work in January 1995) state that "[Ms. Pack's] attention/ concentration has been good, memory has been good." Aplt. App. at 519. Dr. Koduri made no mention in his testimony or his notes of meetings thereafter of any problem with Ms. Pack's ability to concentrate. Instead, Dr. Koduri noted from his January 17, 1995 meeting that Ms. Pack was "relaxed" and "able to function fine," *id.* at 521; and noted from his January 24, 1995 meeting that "[Ms. Pack] does acknowledge that she has been functioning well outside the workplace." *Id.* at 522. So, during the relevant time period — after Ms. Pack returned to work on January 5, 1995 — there is absolutely no evidence she had problems concentrating, and in fact the evidence demonstrated her ability to concentrate was good and she was functioning well.

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5. There were no pretrial rulings prohibiting Ms. Pack from gathering or offering the evidence she now says would sustain her burden.

Plainly, even if this Court were to grant certiorari and hold concentrating is a major life activity, the District Court's directed verdict should still be affirmed because Ms. Pack failed to offer legally sufficient evidence that her mental impairment substantially limited her ability to concentrate.

II. THE COURT OF APPEALS' HOLDING THAT CONCENTRATING IS NOT A MAJOR LIFE ACTIVITY IS NOT IN CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT IN *PRITCHARD v. SOUTHERN COMPANY SERVICES*, AND THE EEOC GUIDANCE IS NOT BINDING ON COURTS.

Ms. Pack next attempts to justify certiorari review under the rules of this Court by contending the decision of the Court of Appeals is in conflict with the decision of the Eleventh Circuit in *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996), *amended on other grounds*, 102 F.3d 1118, *cert. denied*, 117 S. Ct. 2453 (1997), and the EEOC Guidance. The Court of Appeals' decision is not in conflict with *Pritchard*, and any conflict with the EEOC Guidance, which is not binding on courts, is not a compelling reason to grant certiorari review.

Ms. Pack concedes the Court of Appeals' decision is not in conflict with *Pritchard,* a case decided nearly two years prior to *Bragdon* (and therefore devoid of any post-*Bragdon* analysis), when she states "[t]he Eleventh Circuit did not squarely hold concentration to be a major life activity as that precise issue was not directly decided by the District Court." Petition at 11. Indeed, not only did the Eleventh Circuit fail to address the question of whether concentrating

(or the ability to function, sleep, and communicate, the other major life activities alleged by the plaintiff in *Pritchard*) is a major life activity, it did not even discuss any framework from which the district court in that case was to determine whether concentrating is a major life activity. The *Pritchard* Court simply remanded the case to the district court because there were genuine issues of material fact as to whether the plaintiff was disabled under the ADA.

In fact, the Court of Appeals' holding in this case that concentrating is not a major life activity under the ADA does not present a conflict among the circuit courts of appeal on an issue of law. There is no holding or reasoning from any other circuit court of appeal that concentrating is a major life activity under the ADA.[6]

Next, Ms. Pack contends this Court should grant certiorari review because the Court of Appeals' decision conflicts with the EEOC Guidance. The Court of Appeals quite correctly stated that "[w]hile the EEOC's guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference." 166 F.3d at 1305 n.5 (citing *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 899 n.3 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999) (No. 97-1943)). The EEOC Guidance (as opposed to the EEOC regulations) is not issued pursuant to the Administrative Procedures Act

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6. Petitioner also cites *Sherback v. Wright Automotive Group*, 987 F. Supp. 433 (W.D. Pa. 1997). *Sherback* was also decided prior to *Bragdon*, fails to state any rationale for finding that concentrating is a major life activity under the ADA, and, being a district court opinion, does not meet the criteria for establishing a compelling reason to grant certiorari review.

and is, therefore, not binding on the courts. Moreover, the EEOC Guidance contains no reasoning the merits of which this Court can evaluate were it to grant certiorari review.

In sum, Ms. Pack has failed to identify a conflict of the kind this Court should exercise its discretion to review on certiorari.

III. THE COURT OF APPEALS, IN HOLDING THERE WAS INSUFFICIENT EVIDENCE AT TRIAL FROM WHICH A REASONABLE JUROR COULD CONCLUDE MS. PACK WAS "SUBSTANTIALLY LIMITED" IN THE ABILITY TO SLEEP, DID NOT BASE ITS CONCLUSION ENTIRELY ON THE ABILITY TO CONTROL MS. PACK'S SLEEP THROUGH MEDICATION. THEREFORE, EVEN IF THIS COURT AGREES IN THE OTHER CASES BEFORE IT THAT A DISABILITY SHOULD BE MEASURED WITHOUT REGARD TO MITIGATING CIRCUMSTANCES, CERTIORARI REVIEW IS NOT WARRANTED.

Ms. Pack correctly notes this Court has pending before it on certiorari review a trio of ADA cases which include the issue of whether a disability should be evaluated without regard to mitigating or corrective measures. Two of the pending cases are from the Tenth Circuit, which holds that mitigating or corrective measures should be considered when determining whether one is disabled under the ADA. *See Sutton v. United Airlines, Inc.*, 130 F.3d 893, 902 (10th

Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999) (No. 97-1943); *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir.) (unpubl.), *cert. granted*, 67 USLW 3027 (Jan. 8, 1999) (No. 97-1992). *See also Albertson's, Inc. v. Kirkingburg*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999) (No. 98-591). Ms. Pack argues the Court of Appeals determined in this case she was not substantially limited in the major life activity of sleeping because of medication.

While it is true the Court of Appeals made mention of its position that mitigating or corrective measures should be considered when determining whether one is disabled under the ADA, *see* 166 F.3d at 1305-06, the Court of Appeals applied this rule as an *additional* reason for concluding that Ms. Pack failed to present evidence of the extent to which her impairment limited her major life activity of sleeping. The Court of Appeals stated:

> While the evidence showed Pack had episodes of sleep disruption and/or waking without feeling rested during 1994 and January 1995, there is no indication that her sleep problems were severe, long term, or had a permanent impact. [n.6] *Additionally*, Dr. Koduri was able to generally control Pack's sleep problems with medication, even going too far in some instances, resulting in making her too sleepy or drowsy. *See id.* at 505 and 508. Pack failed to satisfy her burden to present evidence of her impairment and the extent to which the impairment limited her major life activity of sleeping. Therefore, the district court did not err in determining that Pack failed to show her

> depression substantially limited her in the major life activity of sleep.

166 F.3d at 1306 (emphasis added). In footnote 6 of the Court of Appeals' opinion it stated: "[w]e note that the EEOC agrees that '[s]leeping is not substantially limited just because an individual has some trouble getting to sleep or occasionally sleeps fitfully.' " *Id.* (citing EEOC Guidance at E-2 n.16.)[7]

Thus, even if this Court holds in the cases already pending on certiorari that a disability should be evaluated without regard to mitigating or corrective measures, certiorari review should be denied. Both the District Court and the Court of Appeals correctly determined, and Ms. Pack does not argue otherwise in the Petition, that there was absolutely no evidence at trial comparing Ms. Pack's sleep with the sleep of an average person in the general population, or of any indication that her sleep problems were severe, were long term, or had a permanent impact. Both Ms. Pack and *Amicus Curiae* EEOC, apparently realizing this deficiency in Ms. Pack's evidence, cited in their briefs to the Court of Appeals various sources and stated as a fact the number of hours the average adult sleeps a day, and the average hours of sleep required for an adult. Petitioner's Opening Brief to the Court of Appeals at 18; Brief of Amicus Curiae to Court of Appeals at 14. Neither this evidence nor any other evidence concerning the sleep habits or requirements of an average person in the general population was presented at trial. There was not even any

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7. The District Court, which also held Ms. Pack's evidence was legally insufficient to establish she was substantially limited in the ability to sleep, *did not* take into account corrective measures in making this determination. *See* Petition, App. B-3.

evidence at trial of the number of hours of sleep a night Ms. Pack had throughout the relevant time period. This lack of required evidence prompted the Court of Appeals to note:

> Additionally, we note that Pack failed to present any evidence regarding the ability to sleep of the average person in the general population which would have significantly aided the trier of fact in a situation like this where there is a dearth of other evidence.

166 F.3d at 1306 n.7 (citing *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 644 (2d Cir. 1998) ("Difficulty sleeping is extremely widespread. Colwell made no showing that his affliction is any worse than is suffered by a large portion of the nation's adult population.").

It is axiomatic that a party may not present evidence on appeal that was not before the trial court. *See, e.g., United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("documents or facts not presented to the district court are not part of the record on appeal"); *Anderson v. Cumming*, 827 F.2d 1303, 1305 (9th Cir. 1987) (the appealing party must insure that sufficient facts are developed at trial to support a challenge on appeal). In the absence of any evidence of the number of hours Ms. Pack was able to sleep during the relevant time period, or how her amount of sleep compared to the amount of sleep obtained by the average person in the general population, or whether her alleged sleep problems were severe, were long term, or had a permanent impact, there was simply no evidence from which a reasonable juror could have found Ms. Pack "substantially limited" in the major life activity of sleeping.

Accordingly, this Court's decision in the cases pending before it on whether mitigating measures should be considered in determining whether an impairment substantially limits a major life activity will not decide this case. Even if mitigating measures are not to be considered, the evidence presented by Ms. Pack was legally insufficient to present the issue of substantial limitation to the jury. Both the District Court and the Court of Appeals so held, and Ms. Pack does not challenge these holdings. Therefore, this Court should exercise its discretion to deny certiorari review on Proposition III of the Petition.[8]

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8. In support of her Proposition III Ms. Pack simply adopts by reference the arguments advanced by the petitioners in *Sutton* and *Murphy*, and the respondent in *Kirkingburg*. Kmart similarly adopts by reference the arguments advanced in the briefs in those cases which support the conclusion reached by the Court of Appeals that mitigating or corrective measures should be considered when determining whether an impairment substantioally limits a major life activity.

CONCLUSION

Kmart respectfully requests the Court deny Ms. Pack's Petition for a Writ of Certiorari, as Ms. Pack has failed to provide any basis under Sup. Ct. R. 10 for this Court to exercise its discretion to review this case. In determining whether concentrating is a major life activity under the ADA, the Court of Appeals applied the proper rules of law set forth by this Court in *Bragdon*. Moreover, the Court of Appeals' decision on this issue is not in conflict with the decision of the Eleventh Circuit in *Pritchard*, nor the decision of any other United States Court of Appeals. Finally, the issue of whether corrective measures should be considered in determining whether an impairment substantially limits a major life activity will have no bearing on the Court of Appeals' decision in this case, as the evidence presented by Ms. Pack at trial was legally insufficient to demonstrate a substantial limitation on her ability to sleep irrespective of whether corrective measures are considered.

Respectfully submitted,

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